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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

Nos. 962, 963, 980

MARTIN M. GOLDMAN, JACOB P. SHULMAN and THEODORE GOLDMAN,

Petitioners,

against

UNITED STATES OF AMERICA.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

JEREMIAH T. MAHONEY,
Attorney for Petitioner Jacob P. Shulman.

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PETITION FOR REHEARING.

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully pray this Court to reconsider its determination made on June 2, 1941, which denied their several petitions for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review judgments of conviction of the crime of conspiracy in connection with a bankruptcy proceeding. Petitioners were tried jointly.

Your petitioners respectfully submit that there is presented in these cases a serious question of constitutional law which should be passed upon by this Court, a question which is bound to have increasing importance in the future, not only with regard to the particular situation here presented, but other situations of like kind.

This question is, whether or not the use by Government agents of a mechanical device for the purpose of overhearing conversations conducted in the privacy of the office of one of the defendants and the introduction in

evidence of the conversations so overheard is an infringement of the right of privacy guaranteed by the Fourth Amendment. In the particular case the mechanical device was a detectaphone, a microphone placed on the *exterior* wall of the office in question. It is the contention of petitioners that the use of this device was facilitated by an unauthorized entry into the office in question. And although, on this phase of the case the facts were otherwise found below, petitioners respectfully submit that it is for this Court ultimately to determine the facts where grave constitutional issues are involved. This is all the more essential because there can be no doubt that if the evidence was obtained as the result of an unlawful entry into the office, thus an unreasonable search of the office, it should have been suppressed as a violation of the Constitution—and the Trial Court was of that opinion (R. 493, 494). The Trial Court's ruling that the agents "could have just as easily" (R. 495) used the detectaphone without a previous unlawful entry into the office cannot overcome the fact that there was such previous unlawful entry and that the agents were, by that entry, enabled to ascertain the layout of the office and particularly the location of the desk, facts which concededly facilitated the placing of the detectaphone. The agent, Schroeder, testified that Turner, who had participated in the unlawful entry, described the layout of the office and that this helped in selecting a location for the detectaphone (R. 103).

But whether the conceded invasion of defendants' constitutional rights facilitated the later use of the detectaphone or not, it is respectfully submitted that no invasion of privacy, such as here took place, can be reconciled with the protection which the Fourth Amendment was intended to assure to the privacy of citizens. We cannot doubt that if, in the case at bar, a dictograph had been installed in the defendants' office and the conversation was thus overheard, the evidence would have been suppressed. We can-

not believe that the Fourth Amendment offers protection only when there has been an unlawful entry on the *inside* of a home or office. We believe that under the decisions of this Court, which will be discussed more fully in the accompanying brief, the Fourth Amendment was intended to protect the privacy of the home or office against any infringement by public authority.

We do not, of course, go so far as to suggest that a police officer may not use his powers of observation to ascertain what is going on inside of a home or office—as by overhearing loud conversation or observing the conduct of persons through an unshaded window,—nor even that such officer might not use ordinary scientific aids, such, for instance, as a field glass. For the Fourth Amendment was intended to protect those who were intent on protecting themselves, it was not intended to act as a shield for the careless. On the other hand, it was intended to assure privacy to those who believed they had acquired such privacy; it was intended to make a man's home his castle when he himself took the ordinary precautions to make it so.

Therefore, we submit, any interference with the walls of that castle constitutes as much an invasion of the privacy of the home as would a direct entry. It should make no difference that the sense of hearing was used by the government, rather than the sense of sight. Nor can it make any difference that the interference with the walls left no mark upon the walls and consisted only of the placing of a mechanical device which transmitted the vibration of the walls. Surely, if a machine should be invented which could photograph through walls it could not be urged that there was no invasion of the home and thus no infringement of the Fourth Amendment because the machine was operated against the interior of the home entirely from the outside. And whatever is true about the home is equally true about a private office.

As we shall show in the accompanying brief, there has recently been a great deal of public interest in the somewhat related subject of wiretapping. The Department of Justice sought to obtain from the Congress legislation authorizing the use of wiretapping, legislation which the Congress declined to give. This proposed legislation brought forth protest from liberal groups and organized labor throughout the country, protests both on the ground of policy and on the ground of constitutional law. From the nature of these protests we confidently assert that had the Department of Justice sought to obtain from the Congress the right to use a device such as a detectaphone, like protest would have been forthcoming. In both cases the danger to the liberty of the individual is substantially the same. In both cases the door is open wide for possible improper use by government agents of the overhearing of confidential communications wholly unrelated to the violation of any criminal law—it must not be forgotten that in the case at bar the office which the agents thus "wall tapped" was a lawyer's office. The opportunities for blackmail and extortion are thus manifest. Indeed, there are considerations which make the tapping of walls even more offensive than the tapping of wires since a person who uses the telephone knows that there is some risk of his conversation being overheard, either by the operator or through some mechanical device resulting in the crossing of wires. A person in the privacy of his home or in a lawyer's office has every reason to suppose that his conversations are not being overheard.

The right of security against the invasion of privacy is perhaps broader in its scope and more universal in its incidence than any other right guaranteed by the Constitution. Moreover, the most far-reaching aspect of the right is involved in the consideration of the millions of private conversations and discussions that are daily episodes in the lives of Americans. A busy lifetime may pass

without experiencing a trial by jury; to the vast majority of our citizenry the writ of habeas corpus is but a matter of academic interest; many never avail themselves of the prerogative of petitioning the government for redress of grievances; but who among us does not constantly have occasion to speak to others in the rightful belief that the conversation is protected from simultaneous divulgence beyond the walls of the home or office where it is taking place? A physical raid—reprehensible though it may be—has the dubious virtue of being readily apprehended by the victim. It is otherwise with the insidious detectaphone. Affixed to the wall of the "castle" that has heretofore enjoyed such beneficent status in Anglo-American law, it contrives to extract the conversation whose unwitting participants deem themselves to be alone, to the end that the "private" conversation may later be used as an instrument of oppression. The Fourth Amendment would indeed be a rigid and inflexible enactment if its tenor were circumscribed by the narrow and literal abuses contemporary to its adoption. It would be virtually impossible to conceive of an individual whose lawful activities and daily pursuits did not properly necessitate the safeguard of privacy. The right becomes far more meaningful, and inroads upon it conversely less profitable, if this Court authoritatively forbids the reception into evidence of testimony predicated upon so egregious a violation.

We also believe that the Courts below erred in ruling that the divulgence of the telephone conversations overheard through the detectaphone was not a violation of the Federal Communications Act and in refusing to permit counsel for petitioners the right to inspect memoranda utilized by government witnesses to refresh their recollections, on both of which points we again respectfully refer this Court to the discussion in the original applications for certiorari.

We, therefore, respectfully submit that a rehearing should be granted in these cases and the determination of this Court denying the writs of certiorari set aside and writs of certiorari to review the judgments of conviction granted.

August 22, 1941.

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Theodore Goldman.

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BRIEF ON APPLICATION FOR REHEARING.

The facts, in so far as they relate to the issues presented to this Court, are not in dispute. Testimony was introduced at the trial of conversations overheard by government agents. The conversations took place in the office of petitioner Shulman, an attorney. They were overheard through the use of a mechanical device placed on the exterior wall of that office. Before that device was used, the agents had made an illegal entry into the office for the purpose of installing a different device, later abandoned. One of the agents himself testified that the placing of the device actually used was facilitated by information obtained as the result of the unlawful entry.

As soon as the petitioner, Shulman, learned of the unlawful entry into the premises he objected to the admission of the testimony and each of the other petitioners was allowed by the Trial Court to participate in this objection (R. 84, 168). Exceptions were also noted by all petitioners to the rulings of the Trial Court permitting the use of the testimony (R. 168, 382).

The objection was, of course, based upon the Fourth Amendment. It is petitioners' contention that this Amend-

ment was intended to secure a broad right of privacy in the home and office which may not be infringed by government agents in the manner above related. The Court below (118 F. 2nd 310) took the view that there was involved here merely a form of eavesdropping, saying that persons "must take the risk of being overheard" provided there is neither trespass nor violation of a statutory prohibition.

We respectfully submit that the Court below erred both in concluding that the conceded trespass had no relation to the later overhearing and in ruling that this constituted nothing more than ordinary eavesdropping. Both of these questions are novel and of such importance as to justify review by this Court.

POINT I.

An unconstitutional trespass made possible the overhearing of the conversations admitted in evidence.

As conceded by the government in its brief in opposition to the granting of the certiorari, two agents of the Federal Bureau of Investigation obtained entrance to Shulman's office without his knowledge on the night of April 6, 1937, for the purpose of inserting a microphone. The following afternoon the agents went to the office adjoining Shulman's and there installed the detectaphone which was later used for the purpose of overhearing the conversations. There is no dispute that Turner, one of the agents who had been in Shulman's office, described its arrangement to Schroeder, one of the other agents (R. 103, 112-113). Moreover, Schroeder testified that this helped him in selecting a location for the detectaphone:

> "Q. Mr. Turner had a pretty good layout in his mind's eye on the Shulman office layout, didn't he? A. Yes, sir.

Q. Didn't that help you somewhat in picking out a good spot to listen to the conversation? A. It did" (R. 103, cf R. 113-115).

That Schroeder also testified that the location of the detectaphone was determined by trial and error (R. 101, 116, 117) cannot take away from the force of the quoted statement. The knowledge of the layout of Shulman's office was bound to be of help in determining the area within which the trial uses would be made, in saving time in the trial and error placement of the detectaphone. Without that so much time might have been lost in the process of trial and error that the result might have been negligible. Certainly, in view of Schroeder's admission that he was helped by the knowledge of the layout of Shulman's office obtained by Turner, it cannot be said that the trespass did not help in obtaining the ultimate evidence.

This Court has laid down the salutary rule that when there has been an entry into premises in violation of the Fourth Amendment, any evidence obtained as the result of such violation must be banned. This principle was first clearly stated in *Silverthorne Lumber Company* v. *United States*, 251 U. S. 385, where the Court said:

"The knowledge gained by the Government's own wrong cannot be used in the way proposed."

The principle was recognized by the Court of Appeals for the District of Columbia in *Nueslein* v. *District of Columbia*, 115 F. 2nd 690, where the Court held inadmissible a statement by the defendant at the time officers illegally entered his premises. Judge Vinson fully reviewed the decisions of this Court and other Federal courts and reached the conclusion that the only effective way of realizing the security guaranteed by the Fourth Amendment was "to dissolve the evidence that the officers

obtained after entering and remaining illegally in the defendant's home." And the Circuit Court of Appeals for the Second Circuit, in *United States* v. *Goldstein*, 120 F. 2nd 485, recognized the force of this rule in considering whether or not witnesses might be allowed to testify who had been induced to become informers because of wiretapping conducted by the government. It was only because the persons there complaining had no standing to object to the wiretapping that the Court in that case upheld the convictions.

Without regard, therefore, to the broader question whether the use of a detectaphone in and of itself would violate the Fourth Amendment, it is submitted that in this case the uncontradicted evidence shows a mingling of knowledge obtained as the result of an unlawful search of the premises with that obtained through the detectaphone itself. And the fact that the entry was made for the purpose of placing something in the office rather than taking something away cannot make the search any the less a violation of the Fourth Amendment. Accordingly, under all the authorities (see also *Nardone* v. *United States*, 308 U. S. 338) the conversations overheard through the detectaphone are tainted with the unlawful entry into the office and should have been excluded.

POINT II.

The use of the detectaphone was a violation of the Fourth Amendment.

This Court has, with rare exceptions, given to the Fourth Amendment a broad and liberal construction so as to preserve the basic purpose for which it was placed in the Constitution. That the Fourth Amendment was created to embody an ancient principle of English liberty that "every man's home is his castle" has been recognized by various writers on constitutional law.* It was enacted against a historical background of the use of general warrants in proceedings for seditious libel resulting in the judgment of *Entick* v. *Carrington*, 19 How. St. Tr. 1029, where Lord Camden declared the objectionable practices illegal, ruling, among other things (p. 1073) that a search for evidence as such was illegal. And this Court in *Gouled* v. *United States*, 255 U. S. 298, carried over into American constitutional law this decision of Lord Camden by ruling that not even a search warrant could be obtained for the purpose of securing to the Government material which was evidentiary in character only.

While the emphasis of many of the decisions is upon the search for and seizure of tangible objects, it must not be forgotten that the Fourth Amendment condemns not merely the seizure but the search as well, and search there may be for purposes other than the seizure of tangible objects.

It will be readily conceded that the Amendment was designed to protect the citizen against the "prying eyes" of the government. (Cooley, op. cit. 425). Can it be said

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* Cooley, Constitutional Limitations, 7th Ed. p. 425;
McLane, Constitutional Law, p. 313;
Von Holtz, Constitutional Law, p. 257.

that the government may use its ears without let or hindrance?

The Trial Court in this very case expressed the opinion that had the conversations been overheard as the result of the microphone originally placed in the office of Shulman, the testimony would have been inadmissible. Nevertheless, there would have been no search or seizure in the conventional sense. In the mind of the Trial Court the distinction appears to have been between a mechanical device which was placed inside of the office and one merely applied to its exterior walls. We submit that no such narrow distinction can constitutionally be made. Surely, the outside wall is as much a part of the office or home as is the inside wall. If this had not been an office among many offices in a large building but a shack isolated in the woods, could it be said that the installation of a scientific instrument on the *outside* wall of such a shack would not be a violation of the constitutional guaranty, whereas there would be such violation had the mechanism been placed within the four walls? In both cases the government has actually trespassed upon the premises by an invasion thereof not consented to by the owner or occupant.

What the government has done here is to "tap" the walls of an office—that it should be an office rather than a home is, of course, inconsequential (see *Silverthorne* v. *United States*, *supra*). But for the decision in the *Olmstead* case, 277 U. S. 438, it could hardly be doubted that any tapping, whether of walls or of wires, would be an invasion of the constitutional guaranty. Nevertheless, within the precise reasoning and meaning of that decision, it is submitted that these petitioners have been materially aggrieved and are entitled to a reversal. The language there employed by the Court establishes that the tapping of the walls of a home or office presents a clear case for the application of the constitutional guar-

anty—and that that situation is distinguishable in principle from the tapping of telephone wires. For, as Chief Justice Taft declared for the Court in the *Olmstead* case:

> "The reasonable view is that one who installs in his house a telephone instrument with connecting wires, intends to project his voice to those quite outside, and that the wires beyond his house and messages while passing over them are not within the protection of the Fourth Amendment" (p. 466).

The Court thus took the position that where a person used a telephone wire which he knew extended beyond the privacy of his home, he ran the risk that some one might overhear the conversation on that wire. The intention in such case is to project the voice beyond the protection of the speaker's private premises.

Not so is the case of persons conferring confidentially in a lawyer's office (apart from any question of privilege). They have no intention of projecting their voices. True, if they speak too loudly they know they may be overheard; so, if they leave doors or windows open, they run a like risk. Where, however, as here, all ordinary precautions are taken to preserve inviolate the confidential character of the discussion occurring within the office, it would be a destruction of all right of privacy to permit what was so confidentially discussed* to be used by government agents who were enabled to overhear the discussion through the use of extraordinary mechanical means, particularly where those means were directly applied to the walls of the premises themselves.

We respectfully call this Court's attention to the hearings recently held before a subcommittee of the Judiciary

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*F. B. I. Agent Ransom testified that the detectaphone could be employed to overhear conversations through a stone wall, saying (R. 95):

"Q. Can you take that through a stone wall?
A. It is possible, yes."

Committee of the House of Representatives in connection with certain bills there pending dealing with wiretapping.* Congress had been asked by the Department of Justice to authorize the use by government agents of wiretapping under certain conditions, an authorization subsequently refused. In opposition to the proposal appeared representatives of all of the labor organizations, including the railroad brotherhoods and of every shade of liberal opinion.

It is fundamental that no emergency can ever justify any relaxation of constitutional rights. Whatever argument may be adduced for the need to preserve the government, and indeed the nation itself, is equally valid for the need to uphold the rights which are of the very essence of our democratic principles. If we must safeguard the republic, we must likewise safeguard the Constitution which is its foundation. The lapse of seventy-five years has not dulled this Court's ringing words in *Ex parte Milligan*, 4 Wall. (71 U. S.) 2:

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government" (p. 120).

For these various reasons it is respectfully submitted that the Court reconsider its previous decision and grant certiorari so that it may fully consider the important question here presented.

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*Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 77th Congress, 1st Session on H. R. 2266 and H. R. 3099 (1941).

Conclusion.

Petitioners respectfully urge this Court to rescind the determination made on June 2, 1941, denying their petitions for writs of certiorari and that it grant such writs to the United States Circuit Court of Appeals for the Second Circuit to review the convictions herein.

Respectfully submitted,

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